July 6. 1780.

ANSWERS

FOR

WILLIAM WELSH, Skinner in Dalkeith, Purſuer,

TO

The PETITION of Margaret Lumſden relict, and Henry Macveagh ſon, of the deceaſed Hugh Macveagh, merchant in Huntly, Defenders.

GEORGE WILSON merchant in Huntly, was debtor to the reſpondent in the ſum of L. 9 Sterling, by bill, dated 21ſt June 1773, payable three months after date.

Upon this bill diligence was raiſed by horning and caption, which were put into the hands of John Syme meſſenger in Huntly, with orders to execute the ſame, and to recover payment of the debt by poinding or impriſonment.

John Syme the meſſenger was, it ſeems, a very worthleſs fellow; for he never accounted for a ſingle penny of this debt to the reſpondent, although it appears, that, by the force of the diligence, he got poſſeſſion of Wilſon the debtor's effects to a greater extent than the debt due to the reſpondent; but having turned them into caſh, he diſhoneſtly ſquandered it away.

The reſpondent brought a proceſs againſt him before the court of ſeſſion, in a ſummons againſt debtors; and, upon the 26th January 1776, obtained decreet for payment of his debt, and for L. 4 of expences. Having uſed ultimate diligence upon this decreet, Syme was incarcerated in the tolbooth of Elgin, from

 which

which he was liberated upon his making oath, that he was not in condition to maintain himſelf in priſon; and thereafter he inliſted as a ſoldier and left the country.

Having thus been tricked out of his money, by the neglect of duty, and fraudulent behaviour of this meſſenger, the reſpondent had recourſe againſt the repreſentatives of John Syme's cautioner, viz. Margaret Lumſden relict, and Henry Macveagh ſon, of the deceaſed Hugh Macveagh merchant in Huntly.

It was not apprehended that any defence would be made againſt ſo juſt a claim. A very ingenious plea, however, was ſtarted at the firſt hearing of the cauſe before the Lord *Stonefield* Ordinary, of which there is a ſhort minute in proceſs, dated 12th February 1778. This plea was an allegation, that it was no part of Syme's duty, as a meſſenger, to intermeddle with the goods poinded; ſo that as Mr Macveagh had been his cautioner only for the due exerciſe of his duty as a meſſenger, but for nothing elſe, the defenders ſhould be aſſoilzied. But to this plea the reſpondent oppoſed the univerſal practice in poindings, and maintained, that a meſſenger could not refuſe payment when offered to him. The Lord Ordinary allowed a proof before anſwer; and the fact came out as the reſpondent has ſtated it to your Lordſhips. Indeed he cannot help obſerving, that the expence of the proof might have been ſaved, if the defenders, who lived in the ſame village that Syme did, and could not but be very well informed of the particulars of his malverſation, had choſen to admit them.

It was impoſſible, upon having the aforeſaid ſtate of the fact aſcertained, not to find the defenders liable to repair the loſs which the reſpondent had ſuffered; and therefore the Lord Ordinary decerned againſt them, and found expences due, and appointed an account thereof to be given in. To which judgement his Lordſhip repeatedly adhered by three conſecutive interlocutors.

July 29. 1779

The defenders have thought proper to bring the caſe under the review of your Lordſhips by a reclaiming petition, which having been appointed to be ſeen and anſwered, theſe anſwers are humbly ſubmitted.

The petition it muſt be acknowledged is an elaborate performance; and the learned gentleman who draws it, has ſtated the proceedings before the Lord Ordinary, the terms of the bond of cautionry,

cautionry, and the words of the act of parliament, ſo fully, that it will not be neceſſary for the reſpondent to make his anſwers by any means ſo long a paper. Indeed, the bond of cautionry is twice narrated, viz. both on the ſecond and ninth pages of the petition. Upon that bond, when interpreted in a juſt and reaſonable manner, and taken in conjunction with the act of parliament, the reſpondent pleads, that the judgement of the Lord Ordinary is exceedingly well founded, and ought to be adhered to by your Lordſhips.

That the reſpondent loſt his debt of L. 9, due to him by George Wilſon, through the malverſation of Syme the meſſenger, is not diſputed, however nicely the petitioners endeavour to diſtinguiſh and limit the nature of that malverſation, as if committed by Syme, *qua* man, and not *qua* meſſenger. But the reſpondent cannot help being of opinion, that if ſuch a nicety were held ſufficient to juſtify a denial of relief to him, the ſecurity of the lieges, when employing meſſengers, would be very ſlender; and the ſalutary proviſion of the act 1587, That meſſengers " ſall find gude and reſponſable ſoverties for obſervation of " the injunctions contained in the end of this preſent act, under the " pain of 500 merks to our Sovereign Lord's uſe, with *coaſtes*, " *ſkaithe*, *damages*, and *intereſt* of parties, grived be the *falſed*, " *negligence*, or *informalitie*, of an officiar," would be eluded. The reſpondent obſerves, that the quotation from this act, on p. 9. of the petition, is erroneouſly printed the words *falſed negligence* being thrown together, as if making one expreſſion; whereas there ſhould be a comma after *falſed*, which ſignifies *falſehood*, there being *three* things which the ſureties or cautioners are to ſecure the lieges againſt in the conduct of meſſengers, viz. *falſehood*, *negligence*, and *informality*. This ſecurity is ſurely ſufficiently broad, and ſhould be underſtood to comprehend every riſk that any perſon may run by employing a meſſenger; and, in conformity with the act, the bond of cautionry for John Syme bears, " That he ſhall *leally*, *truly*, and *honeſtly*, *uſe and exerce the* " *office of meſſengry*, to all and ſundry our Sovereign Lord's lieges, " upon their reaſonable expences; and if he do on the con- " trary, what *damage*, *intereſt*, and *expences*, any of them ſhall " happen to ſuſtain, through the *negligence*, *fraudful*, or *informal* " executions of the ſaid John Syme, we bind and oblige us, both " principal and cautioner, our heirs, executors, and ſucceſſors,

" conjunctly

" conjunctly and ſeverally, to pay the ſame to the party intereſted " or wronged."

The office of a meſſenger, therefore, is an office of conſiderable importance; and, as the act of parliament ſays, " Aucht in- " deede to be uſed be perſons of diſcretion, honeſtie, and cre- " dite." Nor ſhould any man bind himſelf as cautioner for one of thoſe public officers, without being well acquainted with his character, becauſe the bond of cautionry, which is taken for every meſſenger, is very extenſive; and this is abſolutely neceſſary, as it is impoſſible for people who live at a diſtance to know the characters of meſſengers: ſo that they muſt have their dependence upon the general ſecurity found " to all and ſundry our " Sovereign Lord's lieges," under the ſuperintendence of the Lord Lyon.

The petitioners endeavour to impreſs your Lordſhips with the very great danger to which cautioners for meſſengers may be ſubjected, if they ſhould be found liable for the loſs which the reſpondent ſuffered through the groſs negligence and fraud of the meſſenger employed by him. Your Lordſhips are told of ſeveral hundreds of hornings and captions iſſuing from the ſignet-office in one day; that many thouſand pounds may be poinded for by a meſſenger in one week; and that when meſſengers have obtained poſſeſſion of wealth by means of the legal diligence of their employers, they may go off the country, and ſecure it to themſelves.

That it is very dangerous to be cautioner for a meſſenger, is undoubtedly true. But the petitioners do not advert, that there is equal or greater danger in caſes where it is admitted a cautioner is liable, as in ſuch a caſe as the preſent, where it is contended he is not liable. A meſſenger, for inſtance, may be employed to execute an inhibition, by which a debt to the extent of L. 20,000 would be ſecured; he may blunder it, or he may neglect it, ſo that the ſecurity may be loſt; in which caſe, there can be no doubt, that his cautioner would be liable to make good the debt. Or, after having taken a debtor by caption, he may let him eſcape, and ſo bring upon his cautioner the burden of a debt to the largeſt extent. Your Lordſhips therefore ſee, that the alarm which the petitioners have founded as peculiar to caſes ſimilar to that now under conſideration, means truly nothing more

more than the unlimited riſk to which it is well known meſſengers cautioners are ſubjected.

A great deal is ſaid in the petition with reſpect to the form of executing a poinding; and it is alledged, that the creditor, or an attorney for him, ſhould always regularly attend, in order to receive the money as ſoon as paid, or the goods, as ſoon as it ſhall appear that they are not to be relieved by the debtor.

But although, where poindings are executed for great debts, which, by the way, is very ſeldom the caſe, creditors who entertain any diſtruſt of a meſſenger and his cautioner, may think it worth while to attend in perſon, or have an attorney preſent, it is well known, that the general practice in poindings is altogether different. And indeed it muſt be evident to your Lordſhips, that it is not practicable in trade, for creditors to go hundreds of miles to receive ſmall ſums; nor can they bear the expence of an attorney or agent to be paid for acting in room of the creditor. And accordingly, it is believed, there is not a week paſſes, but, in different parts of the country, meſſengers proceed to ultimate diligence; in conſequence of which they recover debts for which they and their cautioners become anſwerable to the creditors.

The caſe now under conſideration affords as good an example as can well be figured. A creditor living in Dalkeith, has the ſmall ſum of L. 9 owing to him by a merchant in the village of Huntly, far remote from him, and ſituated in a part of the north country with which he is altogether unacquainted. In order to recover this debt, how is he to proceed? To go himſelf to Huntly, would be ſuch an expence of time and money as his ſmall debt can by no means afford. Neither can it afford the expence of ſending an attorney whom he can truſt, or even of employing one recommended to him as well known in the neighbourhood, as to which recommendation he would at any rate be very uncertain. His caſe indeed would be very hopeleſs, if there were not better regulations in Scotland for the ſafe recovery of ſmall debts, than the petitioners ſeem willing to allow. But the reſpondent was at no loſs. He knew very well that in every part of the country a perſon may be had who exerciſes a *munus publicum*, under *Lyon King at Arms*, to whom a deputation is committed by the ſovereign; and that every meſſenger has found caution to all and ſundry, that he ſhall faithfully diſcharge his duty.

The reſpondent's agent therefore, Mr Robert Sym writer to the ſignet, to whom John Syme meſſenger at Huntly was unknown both in perſon and character, but whoſe name he found in the liſt of meſſengers in the almanack, wrote to him to do diligence upon this L. 9 bill. Can there then, with ſubmiſſion, be any queſtion, that as it is not denied that the meſſenger ſo employed upon the faith of the general ſecurity, obtained full payment of the reſpondent's debt, and fraudfully ſquandered the money, can there be any queſtion that his cautioner ſhould be found liable to make it good?

So much has the reſpondent ſaid upon the general queſtion as to meſſengers and their cautioners; and he cannot doubt that your Lordſhips will be of opinion that the unlimited obligation of ſecurity, to which a meſſenger's cautioner ſubjects himſelf to all the world who may chuſe to employ the meſſenger, muſt certainly ſecure creditors againſt the fraudulent embezzlement of money, of which the creditor gets poſſeſſion *in the courſe of his office*, according to the daily practice of the realm.

But although there were any doubt upon the general queſtion, the *ſpecies facti* in this caſe is clearly ſuch as to ſubject the cautioner. For your Lordſhips will be pleaſed to obſerve, that in this caſe the meſſenger was poſſeſſed, not only of the letters of horning, and expired charge, with inſtructions to poind, but alſo of letters of caption againſt Wilſon the debtor. Furniſhed with theſe inſtruments, he was undoubtedly bound to do all that the law allows, in order to obtain payment. But what was his conduct? By threatening from time to time to put the caption in execution, he got poſſeſſion of Wilſon the debtor's effects, with a view to protect his perſon, though he had likewiſe inſtructions to put the caption in execution, in caſe he could not procure payment by poinding. And how far he acted faithfully in the truſt committed to him, will appear from the letters which he wrote to the reſpondent's agent, and from the depoſitions of the witneſſes that have been examined.

July 19 1774. By his letter of this date, he writes thus: "As for you and "my friend George Bathgate, writer in your place, I have got "indorſed bills to the amount of L. 11 or L. 12, the principal of "which is one upon Mr Conſtable weaver in Leith, of date 15th "February 1768, for L. 10, 10s. payable at John's coffee-houſe, "of which you'll acquaint Mr Bathgate, who has caption againſt

"Mr

" Mr Wilſon for L. 3, 13 s." By his letter of this date he writes, Sept. 18. 1774.
" I have got two decreets before the ſheriff of Aberdeen, againſt
" part of his debtors, and the reſt of his bills and accounts in my
" hands come payable the 21ſt current." By his letter of this
date, " I have not as yet got any money from Wilſon for you. Oct 30. 1774.
" *I have read your letter to him, and he ſeems to be a little more on his*
" *mettle.* I intend being in Edinburgh next month, and *if he*
" *does not ſettle your affair before I ſet out from here I ſhall leave him*
" *in priſon.* He knows of my coming up; and I really think he
" will get ſomething done among his friends, and nothing elſe
" will do; ſo that I am loth but to give him a few days yet,
" as I have nothing to fear as to his making an elopement.
" I will beg this laſt indulgence for him myſelf. Allow me
" to be," &c. In his letter of this date, he writes, " I have June 6. 1775.
" received yours anent Mr George Wilſon merchant in this
" place. *I have got poſſeſſion of Mr Wilſon's domicills*, but not of
" his accounts, bills, and other debts. I have rouped theſe
" ſubjects for Mr Welch's account, the particulars of which
" I ſhall remit you in a reaſonable time." In his letter of this
date, he writes, " I wrote you in hurry laſt poſt, to which I re- June 8. 1775.
" fer in part. Mr Wilſon is in the country at preſent, otherwiſe
" *I ſhould have ſent you an account of the proceeds of his effects*,
" which I ſhall do how ſoon I get him at home to ſign the ſame."
And by a letter from George Wilſon to the purſuer, of this date, April 27. 1776.
he writes, " Sir, Pleaſe know that I paid John Syme meſſenger in
" Huntly, in March 1775, in value of goods, a purpoſe to pay
" you, to the amount of L. 13, 5 s. Sterling, or thereabouts, as
" he took the whole of my houſehold-furniture, and rouped
" them at his own pleaſure, and never let me have the liſt of my
" own goods in my own cuſtody, ſo that I cannot tell exactly;
" but I am ſure the goods amounted to the above ſum, which I
" can prove; and he never delivered one bill nor diligence up.
" The above is fact, if I am called for. I am," &c.

The depoſitions of the witneſſes taken at Huntly are to the following effect.

John Allan, 1ſt witneſs, " depones, That he was preſent and
" along with John Syme meſſenger in Huntly, at his deſire,
" within the houſe of George Wilſon merchant in Huntly: That
" he then ſee'd John Syme the meſſenger take poſſeſſion of ſome
" chairs and blankets, and other things which he now does not
" particularly remember, for the behoof of William Welſh; and

" that

" that the ſame was done in virtue of diligence; and that he the " deponent did ſee a caption, at the inſtance of the ſaid William " Welſh, againſt the foreſaid George Wilſon. Depones further, " That he heard John Syme the meſſenger ſay, the goods taken " were for a debt due to the ſaid William by the foreſaid George " Wilſon; and that he did ſee a part of the ſaid goods ſold by " roup, by the ſaid John Syme meſſenger, within the houſe of " John Straton maſon in Huntly: That he did ſee the ſaid John " Syme carry a bed, and ſome other things, out of the houſe of " George Wilſon, and lodge them in John Straton's brewhouſe: " That he did not ſee any ſchedule or liſt of the goods taken, " nor was he deſired by John Syme to ſign any paper of that " nature. Depones, That when John Syme aſked him the de- " ponent to go with him to the houſe of George Wilſon, he then " told him, that it was to frighten George Wilſon to give goods " or money to him the ſaid John Syme, for the account of Wil- " liam Welſh. Depones, That he the deponent was not called, " either to be an appretiator or witneſs. And being interrogate " for the defenders, depones, That it was after ſunſetting, and " about day-light going away, when he the deponent went to " George Wilſon's houſe with John Syme. Depones, That he " did not ſee any horning, or charge to make payment, nor any " poinding carried on: That he did ſee the ſaid George Wilſon " deliver ſome chairs and other things to the ſaid John Syme: " That he heard the ſaid George Wilſon then ſay, that John " Syme, and him the ſaid George Wilſon, knew beſt what they " were doing."

John Straton, 2d witneſs, " depones, That John Syme, meſ- " ſenger in Huntly, took a houſe from him the deponent, for " ſome nights, and keeped the key thereof; and that he lodged " therein ſome furniture which he got from George Wilſon " merchant in Huntly, as he the deponent was informed: That " he heard John Syme ſay, that the goods were taken for the " account of William Welſh; and that John Syme told him, " that he had a diligence againſt George Wilſon, founded upon " a bill; but that he the deponent did not ſee it: That John " Syme ſold the ſaid goods by roup, at his the deponent's houſe. " And being further interrogate, depones, That he did neither " ſee the goods delivered nor received, nor any kind of poinding " execute. And further depones, That George Wilſon came and

" lived

" lived with John Syme the meſſenger, in ane room within the " deponent's houſe, immediately after John Syme brought the " goods to the deponent's houſe, and continued there until they " were ſold off, and for ſeveral days after; and that he did ſee " George Wilſon give out ſeveral of the goods to John Syme and " others, in order to be rouped, as they were called for by a liſt. " And further depones, That the ſaid John Syme and George " Wilſon continued to live together in his the deponent's houſe, " until he refuſed to give them any more meat or drink; and " that the deponent accepted of their conjunct bill for what en- " tertainment that they had got while in his houſe."

Robert Brown, the 3d witneſs, " depones, That paſt ten of the " clock at night, he was aſked by John Syme, meſſenger in " Huntly, to go to the houſe of George Wilſon, merchant there, " to ſee a friend: That when he came there, the ſaids John Syme " and George Wilſon aſked him the deponent to put a value up- " on chairs, one cheſt of drawers, and ſome other articles, that " George Wilſon was to deliver to John Syme: That he, and " John Allan, a former deponent, did put a value upon ſome ar- " ticles; and that he the deponent did ſee George Wilſon deliver " the ſame to John Syme: That the goods were for the behoof " of a man, at whoſe inſtance there was diligence againſt the " ſaid George Wilſon: That he heard the goods were carried to " the houſe of John Straton maſon in Huntly, and afterwards " rouped by John Syme. And being further interrogate, de- " pones, That he neither ſigned nor made out the appretiation " of ſaid goods: That he neither did ſee, nor heard of any kind " of diligence, nor charge to make payment, nor of any poind- " ing being execute."

Can your Lordſhips, after reading theſe letters and depoſitions, be of opinion, that John Syme did " leally, truly, and honeſtly, " uſe and exerce the office of meſſengry?" and did he not rather corruptly, faithleſsly, and fraudulently, uſe his office as an engine to compel payment of the debt due to the reſpondent, that he might appropriate the money to himſelf, which he actually did? And ſhall not his cautioner therefore pay " the damage, intereſt, " and expences, to the party intereſted and wronged?"

The petitioners will be very lucky indeed, if they can perſuade your Lordſhips, that the reſpondent's damage, in not recovering his juſt debt, was occaſioned neither by negligent nor fraudful

execution on the part of John Syme, the meſſenger employed by him: for he cannot help thinking, that it appears from the depoſitions of the witneſſes, and the meſſenger's own ſigned letters, that he was both negligent and fraudful to the greateſt degree.

He was poſſeſſed of the reſpondent's diligence of horning, and an expired charge, ſo that he might poind the debtor's effects; but this he neglected, and neglected intentionally too; and in place of executing a regular poinding, he took poſſeſſion of the debtor's effects. He diſpoſed of theſe effects, without accounting to the reſpondent for a ſingle penny of the proceeds; and thus he unqueſtionably was guilty of fraud in the execution or in the not execution of his office.

He was alſo guilty of neglect of duty in not putting the caption in execution, though in company with Wilſon; as appears by his letter of the 20th October 1774, which proves the fact; and that he then read the inſtructions that he had to put the caption in execution: and he ſays, that if matters were not ſettled the then next week, when he was to be in Edinburgh, he would leave Wilſon in priſon; but he never came to Edinburgh; nor did he ever impriſon Wilſon, notwithſtanding the inſtructions he had to that purpoſe,

It is all one to the reſpondent, whether Syme ſhall be held to have executed his office or not to have executed it; becauſe let the petitioners take it which way they pleaſe, he was unqueſtionably guilty either of negligence or of fraud, or truly of wilful negligence and fraud united together.

The reſpondent did all in his power to liberate the cautioner, by endeavouring, at a conſiderable expence, to recover the money from Syme, by taking decreet, and uſing ultimate diligence againſt him, by impriſonment; but ſince that proved ineffectual, as has been already ſtated, the repreſentatives of this meſſenger's cautioner cannot be ſurpriſed to find themſelves brought in for reparation.

If, in ſuch a caſe as the preſent, where a meſſenger was guilty of ſuch a complication of negligence and fraud, a cautioner were not to be found liable, the bonds of cautionry, taken under the authority of the Lord Lyon, for the general ſecurity of all and ſundry who may have occaſion to employ meſſengers as public officers, and upon which bonds the lieges are to have their reliance, would really and truly be good for nothing; and therefore

fore it is hoped your Lordſhips will have no difficulty to adhere to the repeated interlocutors of the Lord Ordinary.

There is a circumſtance in this particular caſe which renders the conduct of the petitioners leſs excuſable; which is, that Mr Macveagh the father had undoubtedly ſome notion of the character of this John Syme the meſſenger before he engaged to be ſecurity for him: for the reſpondent is aſſured, that he abſolutely refuſed to ſubſcribe the bond of caution for Syme until Syme ſhould find caution to indemnify him of any damage he ſhould ſuffer thereby; and accordingly he got a bond of indemnification from three perſons for this purpoſe, of which the petitioners are now poſſeſſed, ſo that they can ſuffer nothing.

But, independent of this circumſtance, the reſpondent humbly apprehends, that the petitioners plead with a very bad grace to be free from expences. The act of parliament, and bond of cautionry, are both expreſs, that a meſſenger's cautioner ſhall be liable for damage, intereſt, and expences; ſo that if he be found liable at all, expences muſt go of courſe: and when your Lordſhips conſider this caſe in particular, it will appear, that unleſs expences are allowed, juſtice cannot be done. The reſpondent's debt being but L. 9 originally due, is a triſle in reſpect of the money he has been obliged to lay out in the different proceſſes, which were abſolutely neceſſary in order to obtain indemnification. The petitioners, it has been ſhewn, were *in mala fide* to make the oppoſition which they have done in this proceſs; and however they may have given the cauſe the important air of a difficult general queſtion, it is plain, that they could not but be conſcious, that, in good faith, and plain honeſty, the cautioner was liable to indemnify the reſpondent; ſo that they ſhould not have put him to an expence greatly exceeding his debt. The reſpondent therefore leaves his cauſe with the court, in humble confidence, that, upon conſidering all its circumſtances, your Lordſhips will find him intitled to complete redreſs.

In reſpect whereof, &c.

JAMES BOSWELL.